Filed 3/10/17 P. v. Cotton CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MARK COTTON, Defendant and Appellant.	C081289 (Super. Ct. No. 09F03566)

Defendant Mark Cotton entered a plea of no contest to various charges stemming from his attempt to pass a fraudulent check at a bank and his possession of a stolen ATM card. He appeals from denial of his petition to redesignate his felonies for second degree burglary (Pen. Code, § 459)[1] and possession of stolen property (§ 496, subd. (a)) as misdemeanors under Proposition 47 (§ 1170.18). He contends entering a bank with the

[1] Further undesignated statutory references are to the Penal Code.

intent to pass a false check constitutes an intent to commit larceny and thus qualifies as misdemeanor shoplifting under section 459.5. He further contends the value of the stolen ATM card was less than $950, so that offense should have been reduced as well.

We agree as to the first point only. As to the second point, we agree that defendant should be permitted to prove the value of the stolen ATM card in his petition for reduction, therefore we affirm without prejudice to his filing a new petition in the trial court which includes information supporting his claim regarding the card's value. We reverse the trial court's order finding no eligibility as to defendant's burglary conviction, and remand for further proceedings.

BACKGROUND

On May 7, 2009, defendant and a companion entered a Bank of America in Sacramento with the intent to pass a fraudulent check belonging to Michelle Kustin-Hall. The check was in the amount of $175.65. That same day, defendant was in possession of a bank ATM card that had been reported stolen by Godo Fredo Uniciano.

As relevant here, defendant entered pleas of no contest to second degree burglary, receiving stolen property, and identity theft. The trial court sentenced him to five years eight months in prison.

In March 2015 when he was no longer in custody, defendant petitioned for redesignation of his felonies for burglary and receiving stolen property.[2] The petition was on a standard form and recited the convictions, cited to various subdivisions of section 1170.18, and requested appointment of the public defender. Although the record

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[2] Defendant also sought redesignation to a misdemeanor of his forgery conviction. (§ 475, subd. (c).) The petition was properly denied as to this felony pursuant to section 473, subdivision (b) because defendant was also convicted of identity theft (§ 530.5, subd. (a)). Defendant does not challenge this denial on appeal.

does not include the court's ruling on this petition, the court presumably denied it as defendant sought reconsideration.

In the motion for reconsideration, defendant, now represented by counsel, argued count two (burglary) should be redesignated a misdemeanor because the check was for $175.65 and count six (receiving stolen property) should be redesignated a misdemeanor because the ATM card had a value of less than $950.

The court denied reconsideration. It found defendant was not entitled to relief on the burglary count because Bank of America was not a commercial establishment under Proposition 47. Further, the court denied relief on the receiving stolen property count because the court was unable to determine the value of the ATM bank card.

DISCUSSION

I

Proposition 47

In November 2014, California voters approved Proposition 47, the Safe Neighborhoods and Schools Act. "Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091 (*Rivera*).) It created a new crime of shoplifting, "defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." (§ 459.5, subd. (a).) Shoplifting is punishable as a misdemeanor unless the defendant has certain disqualifying prior convictions. (*Ibid*.) Receiving stolen property is now a misdemeanor "if the value of the property does not exceed nine hundred fifty dollars ($950)" unless the defendant has certain disqualifying prior convictions. (§ 496, subd. (a).)

"Under section 1170.18, a person 'currently serving' a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that

sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. (§ 1170.18, subd. (a).) A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be 'resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.18, subd. (b).)" (*Rivera, supra,* 233 Cal.App.4th at p. 1092.) A person who is resentenced after a petition under subdivision (a) of section 1170.18 is given credit for time served and is subject to parole for one year, unless the court releases the person from parole. (§ 1170.18, subd. (d).)

"Section 1170.18 also provides that persons who have completed felony sentences for offenses that would now be misdemeanors under Proposition 47 may file an application with the trial court to have their felony convictions 'designated as misdemeanors.' (§ 1170.18, subds. (f); see *id.*, subds. (g)-(h).)" (*Rivera, supra,* 233 Cal.App.4th at p. 1093.) Unlike the provisions for a defendant currently serving a sentence, "[n]o hearing is required unless requested by the applicant (§ 1170.18, subd. (h)), and if the application satisfies the criteria in subdivision (f), the court 'shall' designate the felony offense as a misdemeanor (§ 1170.18, subd. (g)). There is no provision for any period of parole accompanying the redesignation of the offense as a misdemeanor under subdivision (f), nor does subdivision (f) confer discretion on the court to deny the application based on current dangerousness." (*People v. Lewis* (2016) 4 Cal.App.5th 1085, 1092 (*Lewis*).)

II

Whether Subdivision (a) or (f) Applies

Here, defendant's petition for redesignation of his felony convictions did not specify whether he sought relief under subdivision (a) or subdivision (f) of section 1170.18. He checked both boxes. As set forth above, there are different criteria for relief, depending on whether the petitioner is "currently serving a sentence" or has

"completed his or her sentence." (§ 1170.18, subds. (a) & (f).) While the petition states defendant is not in custody, on appeal he seeks release from postrelease community service (PRCS). The People took the position that defendant was still serving his sentence because he was on PRCS.

The first question is whether defendant qualifies for the provisions of subdivision (f) of section 1170.18. In *Lewis, supra,* 4 Cal.App.5th at page 1096, the court held the provisions of subdivision (f) of section 1170.18 apply only "to those persons who have completed their entire sentence, including any period of postrelease supervision, whether through parole or through PRCS." In reaching this conclusion, the *Lewis* court relied on section 3000, subdivision (a)(1) and *People v. Nuckles* (2013) 56 Cal.4th 601. Section 3000, subdivision (a)(1) provides in part: "A sentence resulting in imprisonment in the state prison pursuant to Section 1168 or 1170 shall include a period of parole supervision or postrelease community supervision." At sentencing, the court must "inform the defendant that as part of the sentence after expiration of the term he or she may be on parole for a period." (§ 1170, subd. (c).) In *Nuckles, supra,* 56 Cal.4th at page 608, our high court recognized that parole constitutes part of the punishment for the crime. "Thus, a prison sentence 'contemplates a period of parole, which in that respect is related to the sentence.' [Citation.]" (*Id*. at p. 609.) The *Lewis* court reasoned it would be absurd to release felons who had just commenced a period of parole or PRCS from any postrelease supervision, without regard to their current dangerousness. (*Lewis, supra,* 4 Cal.App.5th at pp. 1095-1096.)

We find the reasoning of *Lewis* persuasive. Accordingly, we construe defendant's petition for redesignation of his felony convictions to be a petition under subdivision (a) of section 1170.18.

III

Second Degree Burglary as a Misdemeanor

Defendant contends the trial court erred in not redesignating his second degree burglary conviction as a misdemeanor. He contends Proposition 47 reduced second degree burglary to a misdemeanor, a new crime of shoplifting, where the value taken or intended to be taken does not exceed $950.

A. *Commercial Establishment*

The trial court denied relief on count two, second degree burglary, because it found a bank was not a commercial establishment within the meaning of Proposition 47. The People do not advance this argument on appeal. We accept the implied concession that a bank is a commercial establishment.[3] We find persuasive the recent analysis in *People v. Smith* (2016) 1 Cal.App.5th 266, review granted September 14, 2016, S236112. (See Cal. Rules of Court, rule 8.115 (e)(1).) In *Smith*, the establishment at issue was a check cashing business. In interpreting the term "commercial establishment," in section 459.5, subdivision (a), the court looked to dictionary definitions and adopted the definition "a place of business established for the purpose of exchanging goods or services." (*Smith*, at p. 273.) A commercial bank, such as Bank of America, falls within that definition. The *Smith* court rejected a narrower interpretation of "commercial establishment" that limited it to "the buying and selling of goods," because the Act "shall be liberally construed to effectuate its purposes." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 18, p. 74.) The purpose of the Act was to "[r]equire

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[3] One court has noted that in other cases, "the People conceded that a bank constituted a commercial establishment. (*People v. Root* (2016) 245 Cal.App.4th 353, 356 [], review granted May 11, 2016, S233546; *People v. Triplett* (2016) 244 Cal.App.4th 824, 829, 831, review granted April 27, 2016, S233172 [plea agreement established defendant entered a bank and the People conceded at a hearing on the petition that defendant entered a commercial establishment].)" (*People v. Hudson* (2016) 2 Cal.App.5th 575, 580-581, review granted Oct. 26, 2016, S237340.)

misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes." (Voter Information Guide, Gen. Elec., *supra*, text of proposed law, § 3, subd. (3), p. 70.) "Adopting the limited definition of 'commercial establishment' will frustrate those purposes and result in the continued incarceration of persons who committed petty theft crimes." (*Smith*, at p. 274.)

B. *Intent to Commit Larceny*

The People contend defendant is not entitled to relief as to his burglary conviction because his intent in entering the bank was to commit identity theft. Even if defendant intended to commit theft by false pretenses, the People's argument continues, section 459.5 does not apply because it applies only to shoplifting as commonly understood to mean stealing items offered for sale.[4] We disagree.

Section 459.5 requires the "intent to commit larceny." (§ 459.5, subd. (a).) Under section 490a, the term "larceny" in a statute is to be read as "theft." Thus, read in the context of section 490a, section 459.5's use of the term "larceny" demonstrates an intent to cover all forms of theft committed in a business during regular hours.[5] Section 484,

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[4] Issues relating to whether the requisite intent is limited to larcenous theft are currently pending before our Supreme Court. (See, e.g., *People v. Gonzales* (2015) 242 Cal.App.4th 35, review granted Feb. 17, 2016, S231171 [whether shoplifting intent element includes use of a fraudulent check to obtain money from a bank]; *People v. Vargas* (2016) 243 Cal.App.4th 1416, review granted Mar. 30, 2016, S232673 [whether shoplifting intent element includes theft by false pretenses].)

[5] We are aware that in a recent opinion, *People v. Martin* (2016) 6 Cal.App.5th 666, review granted Feb. 15, 2017, S239205, the Fifth District held the new crime of shoplifting (§ 459.5) applies only to a larcenous taking based on the use of the term "larceny." We disagree. The use of "larceny" in section 459.5 mirrors that in section 459, the burglary statute. An intent to commit theft by false pretences supports a burglary conviction. (*People v. Parson* (2008) 44 Cal.4th 332, 354; *People v. Nguyen* (1995) 44 Cal.App.4th 28, 30-31.)

subdivision (a) defines theft to include "knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money." This broad definition encompasses fraudulent presentation of a check belonging to someone else to obtain money.

The People argue the voters would have understood "shoplifting" as limited to its common meaning of "larcenous theft of merchandise displayed or offered for sale in a commercial establishment." But that is not how the voters defined "shoplifting" in section 459.5. Instead, they defined it as entering a commercial establishment during business hours with the "intent to commit larceny." Accepting the People's narrow interpretation would require us to rewrite the statute, which we cannot do. (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633 [" 'court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.' "].)

Because it is undisputed that the amount of the check defendant attempted to pass was less than $950, the trial court erred in denying his petition as to this conviction. We remand the matter for the trial court to consider whether to resentence defendant on this conviction under the remaining provisions of section 1170.18. (*See People v. Contreras* (2015) 237 Cal.App.4th 868, 892.)

IV

Receiving Stolen Property as a Misdemeanor

Defendant contends he was entitled to have his receiving stolen property conviction redesignated a misdemeanor because the stolen ATM card was worth less than

$950.[6] He argues that because he did not use the card or otherwise obtain any value from it, its value was minimal.

The People respond that defendant failed to carry his burden to establish the value of the stolen property was less than $950. The People assert the value of an ATM card is based on the amount in the linked accounts and defendant offered no evidence that such accounts contained less than $950.

" 'The value to be placed upon stolen articles for the purpose of establishing a felony charge is the fair market value of the property and not the value of the property to any particular individual.' [Citation.]" (*People v. Lizarraga* (1954) 122 Cal.App.2d 436, 438; see also *People v. Swanson* (1983) 142 Cal.App.3d 104, 108 [applying fair market value rule to section 12022.6 enhancement.) Fair market value is "the highest price obtainable in the market place." (*People v. Pena* (1977) 68 Cal.App.3d 100, 104.)

Although there is no legitimate market for another person's ATM card, we are not required to conclude the card has only the slight value of its plastic. Federal courts have looked to "the street value" or "thieves' market" value in determining the value of stolen blank checks, credit cards, and similar instruments. (See, e.g., *United States v. Luckey* (9th Cir. 1981) 655 F.2d 203, 205 [no evidence introduced as to what the unenhanced blank check would have been worth on the "thieves' market']; *United States v. Jackson* (8th Cir. 1978) 576 F.2d 749, 757 [thieves' market value a proper means of appraising stolen goods or chattels]; *United States v. Tyers* (2d Cir. 1973) 487 F.2d 828, 831 [proper to instruct the jury to consider "street value" of stolen blank money orders]; *United States v. Bullock* (5th Cir. 1971) 451 F.2d 884, 890 [jury could consider the value of stolen money orders based on "what they actually fetched when fraudulently negotiated through

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[6] This issue is currently before the California Supreme Court. (See, e.g., *Caretto v. Superior Court* (May 19, 2016, B265256 [nonpub. opn.]), review granted Aug. 10, 2016, S235419.)

legitimate channels, or at what they might bring on the thieves' market"]; *Churder v. United States* (8th Cir. 1968) 387 F.2d 825, 833 [the measure of value of stolen money orders was "the amount the goods may bring to the thief"].)

Defendant failed to provide any evidence of the "street value" of a stolen ATM card. Accordingly, he failed to carry his burden of proof to establish the stolen goods had a value of less than $950 so as to entitle him to relief on his felony receiving stolen property conviction. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 136-137; *People v. Sherow* (2015) 239 Cal.App.4th 875, 880.) However, this area of the law is far from settled, thus defendant's failure to properly support his allegation of the stolen goods' value need not be fatal to his claim, should he choose to undertake the necessary effort in the trial court. We follow *Perkins* and *Sherow* in affirming the order denying the petition "without prejudice to subsequent consideration of a properly filed petition." (*Sherow* at p. 881; *Perkins* at p. 140.) If defendant can produce some evidence or argument of the card's valuation, the trial court should consider holding a hearing in order to establish a value for the ATM card rather than concluding only that it is "unable to determine [its] value."

V

Release from PRCS

Finally, defendant contends he should be released from PRCS because after redesignation of his felony convictions for burglary and receiving stolen property as misdemeanors, he has already served more than the maximum sentence. As explained *ante*, we must remand for the trial court to determine if defendant's burglary conviction qualifies for reduction to a misdemeanor under Proposition 47, and also to consider defendant's new petition for reduction on the receiving stolen property conviction, if filed. On remand, the court can determine if termination of PRCS is appropriate.

DISPOSITION

The trial court's order concluding defendant's conviction for receiving stolen property is ineligible for resentencing under Proposition 47 is affirmed without prejudice to defendant's filing of a new petition including evidence of the stolen ATM card's value. The order concluding defendant's conviction for second degree burglary is ineligible for resentencing is reversed and the matter is remanded to the trial court for consideration of whether to resentence defendant under the remaining provisions of section 1170.18.

/s/
Duarte, J.

We concur:

/s/
Butz, Acting P. J.

/s/
Mauro, J.